

FCC MAIL SECTION
Before the
Federal Communications Commission
Washington, D.C. 20554

MAY 5 2 30 PM '93

MM Docket No. 92-61
DISPATCHED BY

In re Applications of

LRB BROADCASTING File No. BPH-901218MI

DAVID WOLFE File No. BPH-901219MI

ZENITRAM File No. BPH-901220MG
COMMUNICATIONS, INC.

For Construction Permit for
New FM Station, Channel 288A,
Brockport, New York

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1993;

Released: May 5, 1993

By the Commission:

1. We have considered an application filed by Zenitram Communications, Inc. on November 6, 1992 for review of the Review Board's memorandum opinion and order, 7 FCC Rcd 6459 (1992), affirming the ALJ's dismissal of its application for construction permit.¹ We agree with the Board that the dismissal should be sustained, but additional explanation for the holding is called for in response to some of Zenitram's arguments.

2. The ALJ and the Board identified two procedural derelictions as grounds for dismissal. First, Zenitram failed to file a notice of appearance (or a request for extension supported by a good-cause showing) within 20 days of the mailing of the Hearing Designation Order, pursuant to 47 C.F.R. §1.221(c). Its notice of appearance was filed on May 18, 1992, fourteen days after the deadline. The ALJ concluded that there was no good cause for the late filing of the notice, and the Board concurred in that determination and held that this alone justified dismissal. *Id.* at 6460 ¶11. Second, Zenitram failed to comply with directions in the Hearing Designation Order for each applicant to serve upon the other applicants, within five days after the filing deadline for notices of appearance, documents of the sort described in 47 C.F.R. §1.325(c)(1) and an integration statement pursuant to 47 C.F.R. §1.325(c)(2). Zenitram filed its integration statement one day late and did not file the documents required by §1.325(c)(1) until June 2, 1992, 22 days late. *Id.* at 6459 ¶ 5. The lower decisions hold that the latter default prejudiced the discovery rights of the

competing applicants and would have tended to delay resolution of the case had Zenitram's application been retained. *Id.* at 6461 ¶14.

3. Zenitram argues that the Board erred by failing to properly weigh the undisputed fact that Zenitram had filed a notice of appearance more than nine months prior to the mailing of the Hearing Designation Order and evidence that Zenitram had pre-paid the hearing fee prior to the release of the HDO. The Board reasoned that those matters are of no moment because the rules require notices of appearance to be filed within a specified period after the HDO's mailing, rather than before. *Id.* at ¶13. Zenitram argues, however, that in light of its prior filing of a notice of appearance and asserted pre-payment of the fee its failure to file a timely post-designation notice should be regarded as a minor technicality.

4. We disagree. Failure to file a notice of appearance within 20 days of the mailing of the HDO (or to file, prior to the same deadline, a petition for acceptance of a later-filed notice) is to be distinguished from other procedural derelictions which may warrant dismissal, as the imposition of the penalty of dismissal for defaults of the former kind is prescribed by regulation rather than merely left to the discretionary initiative of ALJs. As Zenitram neither filed a notice within the period specified by §1.221(c) nor filed a petition before the expiration of that period for acceptance of a late-filed notice, it was incumbent upon it, if it would avoid the prescribed penalty, to submit a motion for waiver supported by a sufficient showing for such relief. As it does not allege that it requested such relief or that grounds for granting it exist, its appeal is facially deficient.

5. Furthermore, the late filing of the post-designation notice was no mere technicality, notwithstanding that Zenitram had filed a similar notice and assertedly paid the hearing fee prior to designation. Under the rules, applicants who pre-pay the fee are entitled to a full refund if their applications are later dismissed for failure to file a §1.221 notice of appearance. 47 C.F.R. §1.1111(c). Thus, until it filed a post-designation notice, there was no more assurance that Zenitram would participate in the hearing than there would have been had it not filed a pre-designation notice or pre-paid the fee. And because it retained the option of recovering the fee while it refrained from filing a post-designation notice of appearance, Zenitram was in essentially the same position as the dismissed applicant in *Silver Springs Communications*, 3 FCC Rcd 5049 (Rev. Bd. 1988), *rev. den.*, 4 FCC Rcd 4917 (1989), where the Board correctly held that to allow an applicant to participate in a multi-party comparative hearing after having filed a late notice of appearance would "inevitably lead to abuse of the Commission's processes, applicant gamesmanship, and unfair advantage." *Id.* at 5050 ¶ 7. It is a considerable advantage to know who else will compete in a comparative hearing before irrevocably incurring the expense of the hearing fee. To allow applicants to gain this advantage by violating a regulatory deadline would be unfair to competing applicants who abide by the filing rule and would encourage applicants in future cases to seek to take similar liberties.²

¹ On November 23, 1992, David Wolfe filed an opposition to Zenitram's application for review.

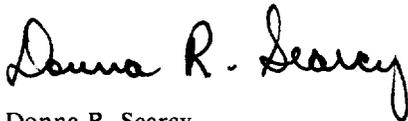
² Zenitram is therefore incorrect in maintaining that this case is analogous to *Nancy Naleszkiewicz*, 7 FCC Rcd 1797 (1992),

where we suggested that waiver of the §1.221(c) deadline was appropriate. As we explained in that opinion, *id.* at 1800 ¶22, the situation based on the prehearing record in that case was materially different from the facts of *Silver Springs* (and likewise

6. Zenitram also argues that the Board ignored a precedent that stands for the proposition that isolated procedural defaults due to an attorney's negligence may be excused if the applicant promptly acts to prevent further derelictions by discharging the attorney and hiring a substitute, citing *Maricopa County Community College District*, 4 FCC Rcd 7754 (Rev. Bd. 1989). Zenitram contends that this principle should apply here because the defaults at issue were not presaged by a pattern of derelictions and because it secured new counsel after the ALJ issued the dismissal order. It is not clear, however, that the defaults at issue here are merely due to negligence on the part of Zenitram's previous attorney. The only evidence presented concerning the failure to file a timely notice of appearance consists of an unattested and uncorroborated statement from the former attorney alleging that the notice was given to an unnamed courier in time for delivery before the deadline, without saying exactly when and where the transfer to the courier occurred or whether the applicant's principals were aware of the relevant circumstances. Regarding the failure to meet the deadline for serving an integration statement and the documents specified by §1.325(c)(1), Zenitram offered no explanation whatever to the ALJ or the Board, 7 FCC Rcd at 6459 ¶ 5, nor does it offer one now in its application for review.³ Thus, this case is easily distinguishable from *Maricopa*, where the applicant gave reasonable justification for its dereliction and provided sufficient information about the relevant circumstances to support a finding that there was no complicity on its part in the procedural misfeasances.

7. ACCORDINGLY, IT IS ORDERED that the application for review filed by Zenitram Communications, Inc. on November 6, 1992 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Donna R. Searcy
Secretary

from the facts of this case), in that the proceeding was not comparative but had instead been instituted merely to determine whether a winning cellular lottery applicant was basically qualified and hence there was no apparent motive of "gamesmanship" to be served by delayed filing of the notice.

³ Zenitram is mistaken in insisting that the untimely production of documents bearing on its basic qualifications was harmless because no hearing issues have been specified concerning

such matters and hence the other parties were not entitled to investigate them through discovery. The fact remains that its adversaries clearly had a right to receive the information within 20 days of designation, and the delay in its production was disruptive insofar as it thwarted investigation, with or without the aid of discovery, to determine whether questions could be raised that would warrant enlarging the hearing issues.